IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

CHARLES MURPHY,	:	
JENNIFER MURPHY,	:	
CHARLES MURPHY, JR.	:	**C. A. 07C-12-028 RFS**
a minor by and through his	:	
parents and next friends	:	
Charles & Jennifer Murphy	:	
	:	
PLAINTIFFS,	:	**ORDER**
	:	**MOTION TO VACATE**
	:	**SCHEDULING ORDER**
v.	:	
	:	**DENIED**
DELMARVA HOMES, INC.	:	
a Delaware Corporation, and	:	
LIBERTY HOMES, INC., a	:	
Foreign corporation	:	
	:	
DEFENDANTS	:	

Submitted: October 1, 2010
Decided: October 5, 2010

The Plaintiffs are the parents of Charles Murphy, Jr. As his guardians, they filed a law suit on December 20, 2007. The suit claimed Charles suffered respiratory problems because of mold exposure resulting from water leaks in their home. The home was manufactured by Liberty Homes, Inc. and sold to Plaintiffs by Delmarva Homes, Inc. on or about January 17, 2004. Liberty and Delmarva have denied responsibility.

Plaintiffs seek to vacate the Pretrial Scheduling Order. Under the Order, trial is scheduled for January 3, 2011; discovery to be completed by October 18, 2010. Plaintiffs were to have identified their experts and reports by July 19, 2010, and Defendants were to have identified their experts and reports by September 20, 2010. *Daubert* motions by Defendants were to be filed by August 19, 2010.

At this point, Defendants have joined together in a *Daubert* motion that was timely filed.[1] It contests the reliability of Plaintiffs' medical testimony that Charles' asthma was caused or aggravated by mold in the home. The Defendants have timely identified their experts. Depositions, interrogatories, and document production have been completed. Until now, the case has proceeded on the theory that Charles' asthma and respiratory problems were attributable to the mold.

Presently, Plaintiffs seek to change the Scheduling Order to permit time to investigate whether additional claims can be made. As to Charles, for whom suit was brought, they want to see if his Attention Deficit Hyperactivity Disorder (ADHD) can be attributed to the mold. The condition was diagnosed on March 11, 2010 by Dr. Steven K. Reader, a clinical child psychologist of Alfred I. DuPont Hospital for Children. Although Plaintiffs raised the question, Dr. Reader did not relate the ADHD

[1]The parties need to confer and to schedule a time for the argument on the *Daubert* motion. The trial date will remain.

condition to mold exposure. His March report did mention Charles' respiratory condition with mold. After the March consult, Plaintiffs represent Charles' mother did internet research in September that ostensibly related mold with ADHD. The internet research is attached to the motion as well.

Later, in speaking with Dr. Reader, Plaintiffs represent that the Doctor "possibly" thinks there may be a causal relationship. There is a significant legal difference between possibilities and probabilities. Plaintiffs must proffer that mold exposure was caused by a reasonable degree of medical probability. Dr. Reader has not given an opinion to this effect. Dr. Reader has not submitted anything that would justify additional delay. From oral argument, it appears Plaintiffs do not have another qualified person.

ADHD may be caused by significant exposure to lead poisoning. *Toxic Torts* § 19:50; On the other hand, low exposures are insufficient. *Palmer v. Asarco, Inc.,* 510 F.Supp.2d 519 (N.D. Okla. 2007). No lead-based exposures are suggested in this case. Broadly speaking, one National Institute of Health Consensus Development Conference related that "the conference participants lamented that the causes of ADHD remain speculative and that no strategies for prevention exist."[2]

[2] 5 JHTHCLP 124,130.

The internet research does not show recently developed science that relates ADHD to mold exposure. The first piece is taken from a website http://chronicfatigueandnutrition.com/. That site in turn identifies Anna Manayan as the author for information associating mold exposure with ADHD. The site leads one to Immune Matrix, http://www.immunematrix.com. It talks about an "innovative system" of healing known as Bio-SET. Anna Manayan is a lawyer and an acupuncturist. *Baird v. Anna Manayan*, 2008 WL 4998341 (Cal. App. 6 Dist.). Her biographical description on the Immune Matrix site says she trained with Dr. Ellen Cutler "in teaching doctors Bio-SET." A federal judge related that the "Bio-SET System is a digestive enzyme replacement system that replaces the nutrients lost through the processing and preparation of foods and thus alleviates allergies, asthma, digestive disorders, and other health conditions." Enzyme products are marketed and distributed with this purpose in mind. *Cutler v. Enzymes, Inc.*, 2009 WL 482291 (N.D. Cal.).

The other piece of internet research purports to be a picture of a child with an oral infection caused by mold. It was downloaded from a website http://www.moldsickness.org. The picture was under a title "Mold Exposure Symptoms." This item was offered as an additional reason for delay. In 2006, Plaintiffs' daughter, Ashlyn, was hospitalized at Beebe Medical Center in Lewes, DE

with lesions. Plaintiffs claim Ashlyn's problems were reflected in the picture. Thus, they hope to show a connection with the alleged mold exposure. No diagnosis was made by the medical physicians or providers at Beebe Medical Center to support this notion. No expert proffer has been made. Technically, Ashlyn is a stranger to this suit.

Such Internet research and purported electronic "evidence" from the internet is not a reliable basis to change a scheduling order. For example, in *St. Clair v. Johnny's Oyster and Shrimp, Inc.,* 76 F.Supp.2d 773 (S.D. Tex. 1999), the Court stated that,

> "Plaintiff's electronic 'evidence' is totally insufficient to withstand Defendant's Motion to Dismiss. While some look to the Internet as an innovative vehicle for communication, the Court continues to warily and wearily view it largely as one large catalyst for rumor, innuendo, and misinformation. So as to not mince words, the Court reiterates that this so-called Web provides no way of verifying the authenticity of the alleged contentions that Plaintiff wishes to rely upon in his Response to Defendant's motion. There is no way Plaintiff can overcome the presumption that the information he discovered on the Internet is inherently untrustworthy. Anyone can put anything on the Internet. No

> web-site is monitored for accuracy and *nothing* contained therein is under oath or even subject to independent verification absent underlying documentation. Moreover, the Court holds no illusions that hackers can adulterate the content on *any* web-site from *any* location at *any* time. For these reasons, any evidence procured off the Internet is adequate for almost nothing, even under the most liberal interpretation of the hearsay exception rules found in *Fed.R.Evid. 807*.

The Scheduling Order may be changed if good cause is shown by Plaintiffs under Civil Rule 16. To make that showing, a party must establish that diligent efforts were made to meet the deadlines. *See Candlewood Timber Group, LLC v. Pan American Energy, LLC*, 2006 WL 258305 at *4 (Del. Super). Here, Plaintiffs were not satisfied with Dr. Reader's opinion, but did not do the internet research until September. The time for designation of experts had passed. Plaintiffs had the March 11th - July 19th period to do so. Plaintiffs were not diligent even if the period were calculated from the end of April through July 19th, assuming credence is given to the April 23 publication date of the Manayan piece.

Further, assuming for argument only, that the internet pieces are unlike voodoo information as characterized in the *St. Clair* case, there is nothing "new" about the Bio-SET approach with enzyme treatment or the effects of myotoxins on the brain.

According to the *Cutler* decision, the enzyme approach was discussed as early as 2001; and during the last four years, the consequences of mold exposure to a person's health have been litigated. See *Atwell v. RHIS, Inc.*, 2006 WL 2686539 (Del. Super.); *Brandt v. Rokeby Realty*, 2006 WL 1942314 (Del. Super).

Moreover, time for discovery of "new evidence" presupposes the evidence itself would be arguably relevant and reliable under Rules 401, 402, 403, and 702 and would colorably satisfy *Daubert* concerns. An article authored by an acupuncturist and lawyer is hardly scientific or reliable. The website has an obvious commercial purpose to sell products. It is an editorial and an advertisement. A picture of a child with an asserted mold infection is not evidence either. Succinctly, these pieces are not evidence nor calculated to lead to the development of scientific evidence recognized by the courts. Nothing has been proffered beyond speculation and vague hopes, and nothing has been proffered that additional time would change the picture.

On the other hand, if the Scheduling Order were changed three months before trial, Defendants would be surprised and unfairly prejudiced. Plaintiffs had from December of 2007 to develop, focus, and present their claims. A last minute change would require a new trial date, more rounds of discovery, amended expert reports, and additional expenses without good reason. While Delmarva appeared to be out of business and did not become actively involved until the Scheduling Order was

entered, that situation does not improve Plaintiffs' position. A case must be managed and concluded - here next January - over three years from the start already beyond time standards.[3]

Considering the foregoing, Plaintiffs have not shown good cause for changing the Scheduling Order, and the motion must be **DENIED**. Copies of the internet references will be filed with the docket as Court exhibits.

IT IS SO ORDERED.

Richard F. Stokes

cc: Dean A. Campbell, Esquire
Gerald J. Hager, Esquire
David Hutt, Esquire

[3]Except for exceptional circumstances, all civil cases should be concluded within 730 days of filing. Superior Court Civil Case Management Plan §3(c).